



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

CWT/142188

PRELIMINARY RECITALS

Pursuant to a petition filed June 26, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on August 21, 2012, at Racine, Wisconsin.

The issue for determination is whether petitioner meets the requisite level of care under the various community waiver programs.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED] (did not appear)
[REDACTED]
[REDACTED]

Appearing for petitioner:

[REDACTED]
Patricia Nichols, Speech/Language
Pathologist
Joanna Haas, Early Childhood Special
Education Teacher

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Written submission of Barbara Behrend, MS, RN, Nurse Consultant,
Compass Wisconsin: Threshold
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Michael A. Greene
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Racine County.

2. Petitioner is a four-year old boy who is diagnosed with Autism Spectrum Disorder. His cognitive function is in the Borderline Range, having scored a Full-Scale IQ of 77 on the Wechsler Preschool and Primary Scale of Intelligence—Third Edition (WPPSI-III). His primary impairment is expressive and receptive communication; he neither communicates nor interacts with his peers. As Margaret Drake, PsyD and Rebecca L. Thompson, PhD put it, “[Petitioner’s] language is significantly impaired as he is not communicating his wants and needs effectively, nor is he engaging in social conversation. [Petitioner’s] language is primarily echoic in nature. He struggles with understanding what is being said to him and he has a significant impairment in conversation skills. [Petitioner] has learned to follow familiar instructions and how to respond to rehearsed questions (e.g. what is your name, how old are you). However, when unfamiliar questions are asked or a memorized question is asked out of context, he does not understand how to respond.”
3. On February 6, 2012, petitioner applied for coverage under the various children’s long-term support waiver, including Children’s Autism Treatment Services, the Family Support program and the Katie Becket program. By letter dated May 18, 2012, the agency advised petitioner that his application had been denied for failure to meet requisite level of care.

DISCUSSION

The various community waiver programs offered under Wisconsin’s Medical Assistance (MA) are designed to allow the state to realize savings by providing services in the community to recipients who might otherwise be institutionalized. Applicants for these programs must meet the financial and non-financial requirements for MA coverage and must also require a level of care comparable to that offered in intermediate care facilities, nursing homes or other institutions, *Medicaid Eligibility Handbook*, Ch. 28, ¶28.1.

Petitioner in this case was found to be ineligible for the Children’s Autism Treatment Services, Family Support and Katie Beckett programs because he did not meet the requisite level of care. The levels of care are described in detail in the Wisconsin Department of Health Services *Medicaid Home & Community Based Services Waiver Manual, Appendix A-10: Institutional Levels of Care—Children’s Long Term Support Programs in Wisconsin* (updated February 2011) (LOC). Four levels of care are described: Intermediate Care Facility, Psychiatric Hospital, Nursing Home and Hospital.

The **Intermediate Care Facility Level of Care** requires that the child meet three criteria:

1. The child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the **Need for Active Treatment**.

LOC at 3 (emphasis in original).

The LOC divides the first criterion into two components. First, “the child must have a diagnosis of Cognitive Disability (i.e. Mental Retardation) or a similar diagnosis that substantially impairs learning,” *id.* The LOC lists diagnostic categories that are considered to be “similar” to a diagnosis of Cognitive Disability and the list includes Autism Spectrum Disorder.

The second component of the first criterion is that the diagnosis result in the child having substantial learning impairments. Substantial learning impairments are measured by,

1. A 30% (25% if the child is under one year of age) or greater delay in aggregate intellectual functioning, based on valid, standardized and norm referenced measures of aggregate intellectual functioning; OR
2. A score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

LOC at 6-7.

During the fair hearing process, it is generally accepted that the state or county agency, as the party which has taken the action appealed from bears the burden of proof of the propriety of that action. *See State v. Hanson*, 98 Wis.2d 80, 295 N.W.2d 209 (Ct.App.1980). Like most public assistance benefits, however, the initial burden of demonstrating eligibility for any particular benefit or program at the operational stage falls on the applicant, *Gonwa v. Department of Health and Family Services*, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003). In other words, it was petitione r's job to demonstrate that he qualified for the benefits for which he had applied.

The record does not contain any information to suggest that there was information to the effect that petitioner was experiencing a 30% or greater delay in aggregate intellectual function or a score of at least two standard deviations below the mean in aggregate intellectual functioning. Drs. Drake and Thompson noted that petitioner scored a full scale IQ of 77 on the Wechsler Preschool and Primary Scale of Intelligence-III; given that instrument's standard deviation of 15, and a mean score of 100, petitioner's aggregate intellectual function comes to more than one but less than two standard deviations below the mean. From my vantage point, the record in this appeal indicat es that petitioner's application did not establish a cognitive disability *that substantially impaired learning*. The measurements required under the first criterion were not met and the Division of Long Term Care properly determined that petitioner did not meet the Intermediate Care Facility Level of Care.

The **Psychiatric Hospital Level of Care-Severe Emotional Disturbance** has four criteria, all of which must be met. They are:

1. The child has a **Diagnosis** of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific **Duration** of time; and
3. The child is in need of **Involvement with Service Systems** related to mental health support; and
4. The child exhibits **Severe Symptomology or Dangerous Behaviors** at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

LOC at 8 (emphasis in original). In considering the Psychiatric Hospital Level of Care, it is sufficient to note that the fourth criterion requires that the patient demonstrate psychotic symptoms, suicidality, violence, anorexia/bulimia, or dangerous behaviors. Nothing of this nature appears on the record and petitioner does not meet the Psychiatric Hospital Level of Care.

The **Nursing Home Level of Care-Physical Disabilities** has two criteria, both of which must be met. They are:

1. The child has a **Diagnosis** of a medical/physical condition resulting in needs requiring long term care services; and

2. The child requires skilled **Nursing Interventions and/or has Substantial Functional Limitations** requiring hands on assistance from others throughout their day.

LOC at 22 (emphasis in original). It is sufficient here to examine the list of skilled nursing interventions that will qualify under the second criterion. They include IV access, tracheostomy care, oxygen, total parenteral nutrition, tube feedings, dialysis, respiratory treatments, wound or special skin care, bowel or ostomy care, urinary catheter and six or more weekly sessions of physical, occupational or speech therapy, *LOC* at 23. None of these interventions are indicated in the record and petitioner does not meet the Nursing Home Level of Care.

The **Hospital Level of Care-Physical Disabilities** is applicable when

1. The child needs **Frequent and Complex Medical Care** that requires the use of equipment to *prevent life-threatening situations*; and
2. The child's complex skilled medical interventions are expected to persist for a specific **Duration** of time; and
3. The child's overall health condition must require **Continuous Assessment of an Unstable and Life-Threatening Condition**.

LOC at 29 (emphasis in original). In the first criterion for this level of care, the child must require complex skilled medical care, which includes tracheostomy care, ventilator care, IV access, oxygen, total parenteral nutrition, a rehabilitation program for brain injury or coma and dialysis, *id.* Again, there is no indication on this record that petitioner requires any care at this level; petitioner does not meet the Hospital Level of Care.

At this point, it would be useful to return to the overall purpose that is to be served by the community waiver programs: to provide care in the community for children who would otherwise be hospitalized or placed in some other institutional setting. The waiver programs are therefore intended to serve a constituency which has impairments that are sufficiently severe as to require the level and intensity of services that would normally be available in a hospital or institutional setting. While I do not doubt that petitioner's condition is a source of ongoing concern for his parents, teachers and health care providers, it is evident to me that petitioner does not meet any of the applicable levels of care and that he is not eligible for coverage under the waiver programs for that reason.

CONCLUSIONS OF LAW

The agency correctly determined that petitioner's condition did not meet any of the levels of care required for coverage under the Children's Autism Treatment Services, the Family Support program and the Katie Becket program.

THEREFORE, it is

ORDERED

That the petition for review herein be and hereby is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new

evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

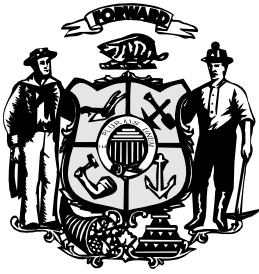
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 2nd day of October, 2012

Michael A. Greene
Administrative Law Judge
Division of Hearings and Appeals

c: Bureau of Long-Term Support - email
Department of Health Services - email



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The preceding decision was sent to the following parties on October 2, 2012.

Bureau of Long-Term Support